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In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a bankruptcy court, in reorganization proceedings under Chapter 11 of the Bankruptcy Code, 11 U.S.C. (Supp. V) 1101 *et seq.*, may authorize a debtor-in-possession to reject a collective bargaining agreement without a threshold showing that the business is likely to fail unless the agreement is rejected.

2. Whether the National Labor Relations Board may properly find that a debtor-in-possession violated Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), by unilaterally changing the terms of a collective bargaining agreement during the period between filing of a Chapter 11 petition and entry of a court order authorizing rejection of the agreement.*

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* In addition to the parties listed in the caption, Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, participated in the proceedings below, as appellant in No. 81-2140, and as intervenor in No. 81-2238.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-26a) is reported at 682 F.2d 72. The decision and order of the National Labor Relations Board (App. C, *infra*, 29a-43a) is reported at 255 N.L.R.B. 1203. The oral opinions of the district court (App. D, *infra*, 44a-48a) and the bankruptcy court (C.A. App. 60a-66a) are unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 27a-28a) was entered on June 17, 1982. Pursuant to orders entered by Justice Brennan on Sep-

tember 3, 1982, and October 5, 1982, the time for filing a petition for a writ of certiorari was extended to and including November 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 2 of the National Labor Relations Act ("NLRA"), 29 U.S.C. (& Supp. IV) 152, provides in pertinent part:

> When used in this subchapter—
>
> (1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11, or receivers.
>
> (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly * * *.

Section 8 of the National Labor Relations Act, 29 U.S.C. 158, provides in pertinent part:

> **(a) Unfair labor practices by employer**
>
> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, or restrain, or coerce employees in the exercise of the rights guaranteed in section [7];
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees * * *.
>
> * * * * *
>
> **(d) Obligation to bargain collectively**
>
> For the purposes of this section, to bargain collectively is the performance of the mutual

obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

> (4) continues in full force and effect, without resorting to strike or lock-out, all of the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:
>
> The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) * * * shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. * * *

Section 365 of the Bankruptcy Code, 11 U.S.C. (Supp. V) 365, provides in pertinent part:

> (a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.
>
> * * * * *
>
> (g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—
>
> (1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, or 13 of this title, immediately before the date of the filing of the petition * * *.

STATEMENT

1. Bildisco is a New Jersey partnership that sells and distributes building supply materials. Some of its employees are represented by Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Union"). The most recent collective bargaining agreement between Bildisco and the Union was effective from May 1, 1979, through April 30, 1982 (App. C, *infra*, 35a). Beginning in January 1980 Bildisco failed to meet certain obligations under the agreement, including payment of pension, health, and welfare contributions, payment of vacation benefits, and remittance to the Union of dues withheld from employees' pay. Beginning in May 1980 it refused to grant wage increases provided for in the agreement (*ibid.*). On April 14, 1980, Bildisco filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. (Supp. V) 1101 *et seq.* (App. A, *infra*, 2a). After that date Bildisco operated its business as debtor-in-possession. During the summer the Union filed unfair labor practice charges with the National Labor Relations Board, and on July 31, 1980, the Board's General Counsel issued a complaint alleging that Bildisco had violated Section 8(a)(5) and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and 158(a)(1), by unilaterally changing the terms of the collective bargaining agreement (App. A, *infra*, 4a-5a).

In December 1980, Bildisco filed a motion with the bankruptcy court requesting permission to reject the collective bargaining agreement with the Union (C.A. App. 1a). At the hearing on Bildisco's motion on January 5, 1981, the only witness was Sal Valente, a general partner of Bildisco. Valente testified that Bildisco's creditors were very concerned about the "union situa-

tion" at Bildisco and that if Bildisco could operate "non-union" it could save around $100,000 in wages and fringe benefits in 1981 (App. A, *infra*, 3a).[1] According to Valente, this projected savings would make "a considerable difference in [Bildisco's] potential profit for 1981" (C.A. App. 36a). On January 15, 1981, the bankruptcy court issued an order granting Bildisco's motion to reject the agreement (App. F, *infra*, 50a). The Union was given 30 days to file a claim for damages resulting from the rejection (*ibid.*). The district court upheld the bankruptcy court's order (App. D and E, *infra*, 44a-49a).

2. During the same period the Board was processing the unfair labor practice complaint against Bildisco. On April 23, 1981, the Board granted the General Counsel's motion for summary judgment against Bildisco. The Board concluded that, since Bildisco had not shown good cause for failing to file a timely answer,[2] the allegations in the complaint should be deemed admitted (App. C, *infra*, 30a-33a, 41a). The Board found that Bildisco, as a debtor-in-possession in reorganization proceedings, was an alter ego of the pre-bankrupt company and an "employer" within the meaning of the NLRA, and that it had violated Sections 8(a)(5) and 8(a)(1) of the Act by

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[1] The cost savings that Valente projected were based on the assumption of 10 employees in bargaining unit positions, although at the time of the hearing Bildisco was operating with only three employees in such positions (App. A, *infra*, 3a & n.2).

[2] Under the Board's rules, 29 C.F.R. 102.20, Bildisco's answer was due within 10 days of service of the complaint. Despite repeated warnings from Board staff, Bildisco failed to file an answer. Bildisco finally filed an answer on May 20, 1981, almost a month after the Board had issued its decision and order (C.A. App. 159a-161a).

unilaterally changing the terms of the collective bargaining agreement (App. C, *infra*, 33a-35a). The Board ordered Bildisco, inter alia, to cease and desist from refusing to bargain with the Union and to make the various payments and remittance of dues required by the agreement (*id.* at 38a-41a).

3. The Union's appeal from the district court's order affirming the bankruptcy court's approval of rejection and the Board's application for enforcement of its order were consolidated in the court of appeals (App. A, *infra*, 6a-7a).[3]

a. The court held first that a collective bargaining agreement is an executory contract within the meaning of Section 365(a) of the Bankruptcy Code, 11 U.S.C. (Supp. V) 365(a), and thus is subject to rejection by a debtor-in-possession (App. A, *infra*, 10a-11a). The court also concluded that a debtor-in-possession is not bound by the restrictions on midterm contract modification contained in Section 8(d) of the NLRA, 29 U.S.C. 158(d) (App. A, *infra*, 12a, 21a-22a). However, the court recognized that the usual test for rejection of executory contracts, i.e., whether rejection would benefit the estate (the "business judgment" test), should not be applied, since the "impact of rejection of a collective bargaining agreement on the rights of workers and the favored status those rights have been accorded by Congress * * * require a more stringent examination of the evidence offered to justify rejection of such a contract" (*id.* at 12a). The court accepted the conclusion of the Second Circuit in *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698, 707 (1975) (quoting *In re Overseas National Airways, Inc.*, 238 F. Supp.

[3] The Board intervened in the Union's appeal, and the Union intervened in the Board's application for enforcement.

359, 361 (E.D.N.Y. 1965)), that, in light of the competing statutory policies, rejection of a collective bargaining agreement requires " 'thorough scrutiny, and a careful balancing of the equities on both sides' " (App. A, *infra*, 12a-13a).

However, the court declined to accept the Second Circuit's subsequent ruling in *Brotherhood of Railway Employees* v. *REA Express, Inc.*, 523 F.2d 164, 172 (2d Cir.), cert. denied, 423 U.S. 1017 (1975), that rejection of a collective bargaining agreement should be permitted only where it could be shown that the company would collapse and the employees would lose their jobs unless the agreement was rejected. The court rejected this "more stringent test" because it believed that it might be impossible to predict the success of a reorganization until very late in the proceedings and that the test unduly exalted perpetuation of the agreement over "the more pragmatic consideration of whether the employees will continue to have jobs at all" (App. A, *infra*, 14a-15a). The court instead fashioned its own standard, under which the debtor-in-possession must first demonstrate that continuation of the collective bargaining agreement would be burdensome to the estate and the bankruptcy court must then weigh the competing equities, with particular attention to doing equity between claims arising under the agreement and other claims against the debtor (*id.* at 17a). The court vacated the district court judgment and remanded the case for reconsideration in light of the test it had articulated (*id.* at 20a).

b. The court refused to enforce the Board's order. It concluded that the Board's finding that Bildisco had violated Sections 8(a)(5) and 8(a)(1) of the NLRA was premised on the view that the debtor-in-possession is an alter ego of the debtor and thus a

party to the collective bargaining agreement (App. A, *infra*, 21a). The court rejected that premise, citing the conclusion of the Second Circuit in *Kevin Steel*, *supra*, 519 F.2d at 704, that the debtor-in-possession is a " 'new entity * * * created with its own rights and duties, subject to the supervision of the bankruptcy court' " (App. A, *infra*, 21a-22a).

The court further concluded that rejection of the agreement related back to the day before the Chapter 11 petition was filed, citing 11 U.S.C. (Supp. V) 365(g)(1), and that this meant that in effect no labor contract existed between the union and the debtor-in-possession subsequent to April 14, 1980 (App. A, *infra*, 24a-25a). The court stated that the rejection did not affect obligations that had arisen prior to the date of the petition, so that the Board would not be precluded from finding an unfair labor practice and imposing monetary relief based on Bildisco's pre-petition conduct (*id.* at 25a-26a). The court remanded so that the Board could separate pre-petition conduct from post-petition conduct. The court expressly stated that if the bankruptcy court again permitted rejection of the collective bargaining agreement the Board would be bound by that determination and thus precluded from finding any unfair labor practice based on failure to meet obligations under the rejected agreement in the post-petition period (*ibid.*).

REASONS FOR GRANTING THE PETITION

This case raises significant and recurring questions concerning accommodation of the policies underlying two statutory schemes—the National Labor Relations Act and the Bankruptcy Code. The decision of the court of appeals acknowledgedly conflicts with decisions of the Second Circuit regarding the showing

that must be made by a debtor-in-possession in order to justify rejection of a collective bargaining agreement during Chapter 11 reorganization proceedings. The standard for rejection fashioned by the court of appeals in this case gives insufficient weight to the important statutory policy in favor of collective bargaining. In addition, the court of appeals' holding that the Board is precluded from finding an unfair labor practice based on a debtor-in-possession's unilateral alteration of the terms of a collective bargaining agreement during the period between filing of a Chapter 11 petition and court approval of rejection of the agreement seriously and improperly interferes with the Board's enforcement of the NLRA. The recent dramatic increase in bankruptcy filings makes resolution of these questions particularly important. Review by this Court is therefore warranted.

1. a. Rejection of a collective bargaining agreement by a debtor-in-possession during reorganization proceedings involves a confrontation between the statutory policies of the National Labor Relations Act and those of the Bankruptcy Code. See App. A, *infra*, 7a. Section 8(a)(5) of the NLRA, 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer, including a trustee in reorganization proceedings,[4] to refuse to bargain collectively with the representatives of his employees. Section 8(d), 29 U.S.C. 158(d), defines the duty to bargain collectively to mean, inter alia, that no party to a collective bargaining agreement shall "terminate or modify it"

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[4] Section 2(1) of the NLRA, 29 U.S.C. (Supp. IV) 152(1), provides that the term "person" includes trustees in cases under Title 11; Section 2(2) of the Act, 29 U.S.C. 152(2), provides that the term "employer" includes any person acting as an agent of an employer, directly or indirectly.

unless that party follows specified procedures.[5] Under these provisions, it is a violation of the Act for a party unilaterally to modify or abrogate a collective bargaining agreement. These provisions embody a central purpose of the labor laws: "the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management." *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 674 (1981).

On the other hand, Section 365(a) of the Bankruptcy Code, 11 U.S.C. (Supp. V) 365(a), provides that a debtor-in-possession may reject executory contracts upon approval by the bankruptcy court.[6] The mechanism of rejection serves an underlying purpose of the bankruptcy laws, since rejection of burdensome

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[5] The required procedures under Section 8(d) include notice to the other party to the agreement and to the Federal Mediation and Conciliation Service, an offer to negotiate a new agreement, and continuation of the agreement for a 60-day period following notice of termination or modification, or until the expiration date of the contract, whichever occurs later. These conditions for modification or termination are designed to "facilitate agreement in place of economic warfare." *Allied Chemical Workers, Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 187 (1971). However, Section 8(d) permits a party to a collective bargaining agreement with a fixed expiration date to refuse to discuss or agree to any modification of the agreement during its term. See *Oak Cliff-Golman Baking Co.*, 207 N.L.R.B. 1063 (1973), enforced, 90 L.R.R.M. (BNA) 2615 (5th Cir. 1974); *C&S Industries*, 158 N.L.R.B. 454, 456-458 (1966).

[6] Section 365(a) provides in pertinent part that "the trustee, subject to the court's approval, may assume or reject any executory contract * * *." Since a debtor-in-possession may exercise the powers of a trustee, 11 U.S.C. (Supp. V) 1107, it may apply for permission to reject executory contracts.

obligations may help a company to return to financial viability. Nothing in the Bankruptcy Code or its history expressly excludes collective bargaining agreements from the class of executory contracts that may be rejected. Section 313(1) of the Bankruptcy Act, 11 U.S.C. 713(1), which also provided for court approval of rejection of executory contracts in reorganization proceedings, likewise did not indicate how collective bargaining agreements were to be treated. Thus, courts have been faced with the need to find a satisfactory resolution of "the tension between the [bankruptcy statute's] policy in favor of giving the debtor a new start and the Labor Act's policy of encouraging enforcement of collective bargaining agreements * * *." *Brotherhood of Railway Employees* v. *REA Express, Inc.*, 523 F.2d 164, 167 (2d Cir.), cert. denied, 423 U.S. 1017 (1975).

b. The Second Circuit led the way in fashioning an accommodation between the NLRA, on the one hand, and Section 313(1) of the old Bankruptcy Act, 11 U.S.C. 713(1) (the predecessor of Section 365 of the Bankruptcy Code), on the other. In *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975), the court held that collective bargaining agreements constituted executory contracts within the meaning of Section 313(1).[7] It

[7] The court found no indication that Congress had meant to exclude collective bargaining agreements from the broad language of Section 313(1). 519 F.2d at 704-705. It noted that, when Congress wished to remove labor agreements from the scope of a general power to reject executory contracts, it knew how to do so, citing Section 77(n) of the Bankruptcy Act, 11 U.S.C. 205(n), which specifically prohibited a bankruptcy court or trustee from changing wages or working conditions of railroad employees except in the manner prescribed by the Railway Labor Act. 519 F.2d at 704-705.

concluded also that Section 8(d) of the NLRA did not preclude a bankruptcy court from allowing rejection of a collective bargaining agreement.[8] However, the court held that a proper accommodation of the interests served by the labor laws required that in the case of collective bargaining agreements bankruptcy courts should use a standard different from the "business judgment" test normally applied to determine whether an executory contract should be rejected. The court concluded that the decision whether to allow rejection of labor agreements should not be based solely on whether rejection would improve the financial status of the debtor, because such a "narrow approach totally ignores the policies of the Labor Act and makes no attempt to accommodate to them" (519 F.2d at 707). Rather, a bankruptcy court should permit rejection of a collective bargaining agreement "only after thorough scrutiny, and a careful balancing of the equities on both sides, for, in relieving a debtor of its obligations under a collective bargaining agreement, it may be depriving the employees of their seniority, welfare and pension rights, as well as other valuable benefits which are incapable

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[8] The court stated that the debtor-in-possession was not the same entity as the pre-bankruptcy company, but was a new entity with its own rights and duties subject to the supervision of the bankruptcy court (519 F.2d at 704). The court believed that the debtor-in-possession should not be required to assume an outstanding labor agreement, since this would place it in a worse position than a successor employer, which generally is not bound by an existing labor agreement (*ibid.*). In the court's view, "[u]ntil the debtor here assumes the old agreement or makes a new one, it is not a 'party' under section 8(d) to any labor agreement with the union and is simply not subject to the termination restrictions of the section" (*ibid.*).

of forming the basis of a provable claim for money damages" (*ibid.*, quoting *In re Overseas National Airways, Inc.*, 238 F. Supp. 359, 361-362 (E.D.N.Y. 1965)).

Approximately a month after its decision in *Kevin Steel*, the Second Circuit expanded on the test to be applied to rejection of collective bargaining agreements. In *Brotherhood of Railway Employees* v. *REA Express*, *supra*, the court extended the principles stated in *Kevin Steel* to agreements under the Railway Labor Act. In restating the *Kevin Steel* test for whether rejection of a collective bargaining agreement should be authorized, the court stated that in view of the serious effects rejection has on employees, it should be permitted "only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, the [company] will collapse and the employees will no longer have their jobs" (523 F.2d at 172).

The *Kevin Steel/REA Express* standard articulated by the Second Circuit has been accepted and applied by a number of bankruptcy and district courts.[9]

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[9] See *In re Miles Machinery*, No. 81-00388 (Bankr. E.D. Mich. June 17, 1982), slip op. 4-5 (rejection disallowed); *In re David A. Rosow, Inc.*, 106 L.R.R.M. (BNA) 2842, 2843-2844 (Bankr. D. Conn. 1981) (same); *In re Connecticut Celery Co.*, 106 L.R.R.M. (BNA) 2847, 2851-2853 (Bankr. D. Conn. 1980) (same); *In re Studio Eight Lighting, Inc.*, 91 L.R.R.M. (BNA) 2429, 2430 (E.D.N.Y. 1976) (same). Compare *In re Brada Miller Freight System, Inc.*, 16 Bankr. 1002, (N.D. Ala. 1981), appeal docketed, No. 82-7043 (11th Cir. filed Jan. 28, 1982) (rejection allowed); *In re Allied Technology, Inc.*, 8 Bankr. 366 (Bankr. S.D. Ohio 1980) (rejection allowed when business had ceased operating and generating revenue); *In re Alan Wood Steel Co.*, 449 F. Supp. 165, 169-170 (E.D. Pa. 1978) (same); *In re Penn Fruit Co.*, 92 L.R.R.M. (BNA) 3548 (E.D. Pa. 1976) (rejection allowed where no possibility

The standard generally has served as a predictable guideline for employers involved in reorganization proceedings, their employees, and the Board.

c. The Third Circuit here expressly rejected a crucial aspect of the Second Circuit standard for rejection of collective bargaining agreements. Under the decision below a debtor-in-possession need not make a threshold showing that the company is likely to go out of business unless a collective bargaining agreement is rejected. The failure to require such a showing is erroneous.

Under the old Bankruptcy Act, the courts generally required debtors-in-possession to make the threshold showing. Congress presumably was aware of this judicial interpretation at the time it enacted the new Bankruptcy Code in 1978, see *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978), but gave no indication that it intended to overrule it. Congressional reenactment of the provision without substantial change strongly suggests an intent to adopt the consistent judicial interpretation of that provision. See, e.g., *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-698 (1979); *Lorillard* v. *Pons*, *supra*, 434 U.S. at 580; *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 366 (1951).

The threshold showing required under the *Kevin Steel/REA Express* standard is necessary in order to afford adequate recognition to the important statu-

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existed of saving jobs of employees). Until the Third Circuit's decision in this case, no other court of appeals had specifically addressed the proper standard for rejection of a labor contract. Cf. *Local Joint Executive Board* v. *Hotel Circle, Inc.*, 613 F.2d 210, 213-214 n.2 (9th Cir. 1980) (finding it unnecessary to address the question whether the bankruptcy court "should apply a stricter standard for authorizing the rejection of collective bargaining agreements as a means of reconciling the policies of the labor and bankruptcy laws").

tory interest in collective bargaining. As this Court has recognized, there is a strong public interest in collective bargaining, and collective bargaining agreements occupy a special status. It is fundamental that "a collective bargaining agreement is not an ordinary contract." *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 550 (1964). See, generally, Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956). Rather, "it is a generalized code to govern * * * the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-579 (1960) (footnote omitted). The special status of collective bargaining agreements under our national labor policy argues in favor of a stringent standard governing rejection of such agreements.

Application of a strict standard for rejection of collective bargaining agreements is especially important because of the impact of rejection on employees. A collective bargaining agreement normally provides employees with many nonmonetary rights, such as seniority, grievance and arbitration procedures, and no strike/no lockout clauses; these rights, as well as any monetary benefits, are wiped out when the agreement is rejected. The availability of a claim for monetary damages for breach of the agreement is clearly inadequate to compensate employees for loss of these rights. See *Kevin Steel*, *supra*, 519 F.2d at 707. Even the monetary terms of the agreement, such as wages and benefits, stand on a different footing from the claims of commercial creditors whose contracts have been rejected. While such creditors generally spread risk among numerous customers, employees are wholly dependent on their employer for wages and benefits.

The predicament of employees is especially difficult during periods of financial recession, when bankruptcies are most likely to occur.

The statutory policy in favor of collective bargaining requires that rejection of a collective bargaining agreement be a last resort, not a routine matter. If debtors-in-possession were not required to show that a business will fail unless rejection of a labor contract is permitted, such rejection would become much more frequent. Debtors-in-possession are understandably eager to shed what they may regard as troublesome obligations under a labor contract. However, a proper accommodation of the policies underlying the labor laws requires that rejection of collective bargaining agreement obligations not occur unless it is essential to survival of the company.[10]

The acknowledged conflict between the Second and Third Circuits regarding the proper accommodation of the labor and bankruptcy laws creates uncertainty

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[10] The reasons offered by the court below for rejecting the *Kevin Steel/REA Express* test do not withstand scrutiny. The court observed first that it may be impossible to predict the success of a reorganization until late in the proceedings (App. A, *infra*, 14a). That criticism misses the point: until it *is* apparent that the business is likely to fail unless the collective bargaining agreement is rejected, a proper accommodation of the policies underlying the labor laws requires that the terms previously bargained for remain in effect. The court also expressed concern that the *Kevin Steel/REA Express* standard "would make it likely that numerous businesses attempting to reorganize will in fact be forced over the line into liquidation" (App. A, *infra*, 14a-15a). The court cites no examples of such an occurrence, and its concern appears to be groundless. If at any point during the reorganization proceedings a debtor-in-possession can show that it is likely to be forced into liquidation, it can then seek rejection of the collective bargaining agreement.

and thus is likely to stimulate considerable litigation in bankruptcy courts around the country. The conflict also prevents administration of a uniform standard for protection of collective bargaining interests; thus, union members whose employers file for reorganization in the Third Circuit will be afforded much less protection than members of the very same union whose employers file for reorganization in the neighboring Second Circuit. For example, application of the Second Circuit standard in the present case would have resulted in dismissal of the motion for rejection, since Bildisco's evidence was clearly insufficient to establish that the business would fail if the agreement were not rejected.[11] Absent a resolution of the conflict, employers, employees, and the Board will be unable to look to a single standard governing protection of rights under a collective bargaining agreement during reorganization proceedings. In light of the high number of such proceedings currently pending, resolution of the conflict is a matter of considerable importance.

d. In several other respects the standard adopted by the court below gives considerably less weight to collective bargaining interests than the Second Circuit standard. The court below established a test (App. A, *infra*, 17a) under which the debtor-in-possession first must show that an agreement is burdensome to the estate and the bankruptcy court then must balance the equities, with particular attention to establishing equity between the employees and the

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[11] The single witness for Bildisco testified only that creditors were concerned about the "union situation" at Bildisco, that Bildisco could save $100,000 in 1981 if it operated non-union, and that this would make a "considerable difference" in Bildisco's potential profit for 1981 (App. A, *infra*, 3a; C.A. App. 36a, 41a).

creditors. In addition, the bankruptcy court must make a reasoned determination that rejection of the agreement will assist the debtor-in-possession to achieve a satisfactory reorganization (*ibid.*). Under this standard it seems likely that the majority of collective bargaining agreements could be rejected. Presumably most debtors-in-possession could establish that a labor contract imposed some financial burden on the estate and deprived it of assets that could be used for other purposes. In addition, under the balancing of equities no special weight is to be given to collective bargaining interests; instead, interests of creditors are to be weighed equally with interests of employees. Presumably a court could always conclude that since creditors are compromising during reorganization, employees, too, should sacrifice.[12] Finally, rejection of contractual obligations to employees presumably could be said to assist in achieving a satisfactory reorgani-

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[12] The court of appeals indicated (App. A, *infra*, 16a) that one factor to be weighed in a balancing of the equities is the fact that employees could file a claim against the estate for damages resulting from rejection of a collective bargaining agreement. As suggested above, such a claim would provide no compensation for loss of the numerous nonmonetary rights to which employees are entitled under most collective bargaining agreements. For example, the agreement in this case included provisions relating to duties of employees, seniority, arbitration of disputes, leave, vacations, and many other aspects of the employer-employee relationship. See C.A. App. 2a-29a. In addition, recovery of any monetary claims is an uncertain proposition, since claims based on rejection are classified as pre-petition claims (see 11 U.S.C. (Supp. V) 365(g)(1)) and are thus part of the class of general unsecured claims. Thus, employees may have little chance of recovering compensation for their lost contractual rights. It is therefore improper to consider this factor as weighing in favor of rejection in a balancing of the equities.

zation in many cases. We submit, however, that such a standard gives insufficient weight to the special status of collective bargaining agreements under the NLRA and to the special hardships imposed on employees as a result of rejection.

The Third Circuit test also gives insufficient consideration to Congress' decision that the relationship between labor and management should be resolved through the collective bargaining process. The court below made no reference to the possibility that the bankruptcy court, before entertaining a petition to reject the existing agreement, could require the debtor-in-possession to attempt to reach a new agreement with the union that would preserve rights of employees to the maximum extent possible, while easing some of the financial pressure on the estate.[13] Instead, the court's test allows the bankruptcy court to usurp the parties' roles in the collective bargaining process and to decide for itself such questions as whether "it would be in the interests of the workers in a bargaining unit to be afforded the opportunity to continue to work under less generous financial benefits than to insist upon an absolute payment of vacation benefits, pension, health and welfare benefits, and wage increases" (App. A, *infra*, 18a n.13);

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[13] One court has suggested that there should be a threshold requirement that the debtor-in-possession attempt to renegotiate the collective bargaining agreement before a rejection application may be made to the bankruptcy court. *In re Price Chopper Supermarkets, Inc.*, 19 Bankr. 462, 466 (Bankr. S.D. Cal. 1982). And see Note, *The Labor-Bankruptcy Conflict: Rejection of a Debtor's Collective Bargaining Agreement*, 80 Mich. L. Rev. 134, 149-152 (1981), suggesting the same requirement. The record in this case suggests that the debtor-in-possession made no attempt whatsoever to renegotiate the collective bargaining agreement it sought to reject.

and whether the employees are likely to strike if the contract is rejected (*id.* at 16a).[14] Of course, these normally are matters that are best worked out by the parties themselves; given the mutual interest of employer and employees in preservation of the business, it would be most unusual for employees to insist on continuation of particular terms if the debtor-in-possession could demonstrate during negotiations that adherence to those terms would cause the business to fail. A proper accommodation of the statutory labor policy appears to require that, even if rejection might be warranted, the debtor-in-possession first must seek to bargain in an effort to reach a mutually satisfactory solution.[15]

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[14] The practice of bankruptcy judges of participating in the affairs of the debtor's estate, including negotiation of contracts, was one of the problems that the Bankruptcy Code was designed to avoid. See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 88-91 (1977). The Third Circuit's standard for rejection defeats the congressional purpose by unnecessarily injecting bankruptcy judges into the arena of collective bargaining.

[15] Although the court of appeals remanded so that the bankruptcy court could apply the standard it had fashioned, the case is now ripe for review. The court of appeals' ruling "is fundamental to the further conduct of the case" (*United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945)), and the conflict between the circuits involves a "fundamental" issue. *Hanover Star Milling Co.* v. *Metcalf*, 240 U.S. 403, 408-409 (1916). The basic issue on which the Second and Third Circuits are divided—whether a debtor-in-possession must make a threshold showing that the business will fail if rejection of a collective bargaining agreement is not allowed—may be dispositive of the outcome of this case, since, if the Second Circuit test is applied, Bildisco's showing was clearly insufficient to justify rejection of the agreement, and its mo-

2. The court below also held (App. A, *infra*, 20a-26a) that if the bankruptcy court on remand authorized rejection the Board would be precluded from finding an unfair labor practice on the basis of Bildisco's conduct in the period following the filing of the Chapter 11 petition. This ruling is incorrect and seriously undermines the Board's ability to protect the collective bargaining rights of employees during reorganization proceedings, thus depriving employees of important protection at a time when they are particularly vulnerable.

The court of appeals rested its holding primarily on its conclusion that the bankruptcy court had permitted rejection of the collective bargaining agreement retroactive to the date immediately preceding the date Bildisco filed its Chapter 11 petition (see App. A, *infra*, 24a-25a). In fact, neither the bankruptcy court's order nor the district court's order (see Apps. E and F, *infra*, 49a-50a) indicates that the rejection was to be retroactive or refers to an effective date for the rejection.[16] The court of appeals (App. A, *infra*, 4a, 24a) cited 11 U.S.C. (Supp. V)

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tion should have been dismissed. Moreover, prompt resolution of this issue could avoid uncertainty and unnecessary litigation in other cases, as well as a drain on the assets of Bildisco. If the Third Circuit's test were applied, the parties would be required to present evidence on a variety of matters which, under the Second Circuit standard, either would be irrelevant or would not be reached unless the threshold showing had been made. It is important not only to the parties directly affected by business failures, but also to the efficient administration of the labor and bankruptcy laws, that the standard for rejection of collective bargaining agreements be uniform and clearly defined.

[16] Bildisco's motion requesting approval of rejection (C.A. App. 1a) also did not specify any effective date.

365(g)(1), which provides that rejection of an executory contract constitutes a breach of the contract "immediately before the date of the filing of the petition." [17] However, that section refers only to the priority of claims for damages based on rejection of the contract, not to existence of the contract in the post-petition period.[18]

It is well established that contractual obligations of a debtor continue to exist in the period following the filing of a reorganization petition. See, e.g., *Truck Drivers Local Union No. 807* v. *Bohack Corp.*, 541 F.2d 312, 321 n.15 (2d Cir. 1976): "If the contract is rejected by the bankruptcy court, it will be deemed to have been breached as of the date of filing of the petition under Ch. XI. But like any other unilateral breach of contract, it does not destroy the contract * * *." [19] A debtor-in-

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[17] See also 11 U.S.C. (Supp. V) 502(g), which states that a claim arising from rejection of an executory contract shall be determined "the same as if such claim had arisen before the date of the filing of the petition."

[18] The legislative history confirms that Congress included Section 365(g)(1) to ensure that claims based on rejection of executory contracts would be treated as pre-petition claims, i.e., that they would have the status of general unsecured claims. See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 349 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 60 (1978). A similar rule applied to claims based on rejection of executory contracts under the old Bankruptcy Act. See 14 *Collier on Bankruptcy* ¶ 11-53.04[4], at 11-53-16 (J. Moore & L. King 14th ed. 1976).

[19] See also *In re W.T. Grant Co.*, 620 F.2d 319, 321 (2d Cir.), cert. denied, 446 U.S. 983 (1980); *In re Unishops, Inc.*, 553 F.2d 305, 308 (2d Cir. 1977); *In re Alfar Dairy, Inc.*, 458 F.2d 1258, 1261 (5th Cir.), cert. denied, 409 U.S. 1048 (1972); 2 *Collier on Bankruptcy* ¶ 365.03, at 365-22 (L. King 15th ed. 1982).

possession is not free to ignore its obligations under a collective bargaining agreement simply because it has filed a Chapter 11 petition; nor will court approval of rejection at some later point relieve the estate of liability for an earlier breach of the agreement.[20] Likewise, there is no reason why the Board may not find unilateral alteration of the terms of the agreement during the post-petition period to constitute an unfair labor practice. The Board's order in such a case is one "designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice." See *Nathanson* v. *NLRB*, 344 U.S. 25, 27 (1952). The refusal of the court of appeals to enforce the Board's order in this case frustrates that statutory policy.

The court of appeals also suggested that no unfair labor practice could have been found because the debtor-in-possession was a new entity and thus was not a party to the agreement, citing the Second Circuit's opinion in *Kevin Steel* (see App. A, *infra*, 21a-22a). However, the Second Circuit itself has warned that the "new entity" concept advanced in *Kevin Steel* cannot be carried too far. In *Truck Drivers Local Union No. 807* v. *Bohack Corp.*, *supra*, 541 F.2d at 320, the court cautioned that "the statement that the debtor is not a 'party,' and the analogy to the successor employer, cannot be taken literally, since neither affirmance nor rejection of the collective bargaining agreement would be possible by one not a

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[20] The court of appeals apparently recognized that the employees could assert claims based on Bildisco's failure to meet its contractual obligations in the post-petition period. See App. A, *infra*, 16a.

party to it." [21] The court in *Bohack Corp.* stressed that the bankruptcy laws did not authorize a debtor-in-possession to ignore its obligations under the NLRA (*ibid.*). See also *Kevin Steel, supra*, 519 F.2d at 706; App. A, *infra*, 16a. Here Bildisco committed an unfair labor practice by unilaterally altering the terms of the collective bargaining agreement in the post-petition period. The subsequent rejection of the agreement did not wipe out that unfair labor practice, and the Board therefore should not have been precluded from issuing an order.

The court of appeals' conclusion that rejection operates to wipe out the existence of a collective bargaining agreement in the period subsequent to filing of the petition places employees in a wholly untenable position. Most employees have only their own time and skills as a source of livelihood. Ordinarily they have the option of seeking alternative employment if they are unwilling to provide services under existing contractual terms. If rejection can operate to nullify those terms retroactively, employees will lose benefits for a period during which they believed themselves contractually entitled to receive them. At the same time, debtors-in-possession will be encouraged to disregard contractual obligations long before

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[21] The "new entity" concept articulated in *Kevin Steel* has not been accepted by the Board (see page 6, *supra*) and has been criticized by commentators. See, e.g., Note, *Bankruptcy and the Rejection of Collective Bargaining Agreements*, 51 Notre Dame Law. 819, 829-830 (1976); Note, *Bankruptcy Law—Labor Law—Rejection of Collective Bargaining Agreements as Executory Contracts in Bankruptcy*, 22 Wayne L. Rev. 165, 172-173 (1975) ("it is difficult to see how a debtor-in-possession can be truly distinct from its former self").

it becomes clear that they will be entitled to reject an agreement. Moreover, the expectation that rejection will be retroactive removes an important incentive for the debtor-in-possession to negotiate with the union to obtain a modification of the agreement that will preserve some employee rights before taking the drastic step of repudiating it. Finally, the court of appeals' holding seriously impairs the Board's unique ability to protect the collective bargaining interests of employees during reorganization proceedings by issuing orders directed at unfair labor practices. Such orders can operate to deter unilateral alterations in the terms of a collective bargaining agreement and also to aid employees in recovering compensation for benefits due under the agreement.[22] In a period of increasing bankruptcies, it is particularly important that the Board not be precluded from exercising its statutory responsibilities. In view of the serious practical consequences of the court of appeals' decision, review by the Court is warranted.

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[22] A Board claim for payment of wages and other benefits owing for the period of Chapter 11 operations is a claim for costs of administration and thus would receive priority in payment from the estate. See *In re Bel Air Chateau Hospital, Inc.*, 106 L.R.R.M. (BNA) 2834 (C.D. Cal. 1980). In contrast, claims based on rejection of an executory contract are treated as pre-petition claims under 11 U.S.C. (Supp. V) 365(g)(1) and thus join the class of general unsecured claims. Filing of a Board claim on behalf of a group of employees is an efficient way to obtain recovery of payments that otherwise may be too small to warrant filings on an individual basis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2140 and 81-2238

IN RE: BILDISCO, A General Partnership of the State of New Jersey,

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, APPELLANT, No. 81-2140
NATIONAL LABOR RELATIONS BOARD, INTERVENOR

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 81-0513)

NATIONAL LABOR RELATIONS BOARD, PETITIONER, No. 81-2238

v.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, RESPONDENT

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INTERVENOR

National Labor Relations Board
Application for Enforcement

Argued March 19, 1982

Before: ALDISERT, VAN DUSEN, and GARTH
Circuit Judges

(Filed June 17, 1982)

OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

In these consolidated proceedings we are required to accommodate the tension between two important aspects of our national policy, represented by the National Labor Relations Act and the Bankruptcy Reform Act of 1978. Specifically, we must decide whether the bankruptcy court erred in permitting a debtor-in-possession to reject a collective bargaining agreement as an executory contract. We also must consider the National Labor Relations Board's application for enforcement of its order determining that the same debtor-in-possession committed an unfair labor practice by unilaterally changing the terms of the agreement. We vacate the judgment in the appeal at No. 81-2140 and remand for further proceedings. Because the NLRB both erred in its choice and application of legal precepts and abused its discretion, however, we deny the application for enforcement at No. 81-2238.

I.

Bildisco, a New Jersey partnership engaged in selling and distributing building supplies, filed a voluntary petition for reorganization on April 14, 1980, under Chapter 11 of the Bankruptcy Code. The bankruptcy court thereafter designated the partnership as a debtor-in-possession and authorized it to operate the business under 11 U.S.C. § 1107.[1]

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[1] A debtor-in-possession is the debtor, 11 U.S.C. § 1101(1), who is given many additional rights, powers, and duties to the estate, as set forth generally in § 1107:

> (a) Subject to any limitations on a trustee under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights,

Bildisco and Local 408 of the Teamsters Union were parties to a collective bargaining agreement that on the date of the petition covered eighteen of Bildisco's employees. On January 5, 1981, the debtor-in-possession sought bankruptcy court permission to reject the collective bargaining agreement under 11 U.S.C. § 365(a), which permits rejection of executory contracts upon bankruptcy court approval. The sole witness at the hearing on the motion was one of Bildisco's partners, Sal Valente, who testified that Bildisco's creditors were concerned about the "union situation" and that by operating without the collective bargaining agreement Bildisco would be able to save approximately $100,000 in 1981. Although eighteen of Bildisco's employees were covered by the collective bargaining agreement as of the date of the petition, by the date of the hearing the number had been reduced to three.[2] The union cross-examined Valente, but it did not offer any other evidence concerning the effect of rejection on Bildisco's employees.

The bankruptcy judge, without expressly articulating the standard that he applied,[3] granted permis-

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other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106 (a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

[2] Valente estimated that Bildisco would be increasing the number of employees to ten as the off-season ended, and his projections of the savings that would be realized if the agreement were rejected are predicated on the costs of salaries and benefits to ten employees.

[3] The bankruptcy judge concluded his consideration of the standard to be applied as follows:

sion to reject on January 15, 1981, retroactive to the date immediately preceding the date of the petition. *See* 11 U.S.C. § 365(g)(1). The union appealed to the district court, which on May 4, 1981, issued a bench opinion affirming the order of the bankruptcy court. Noting that the bankruptcy judge had not identified the test he had used, the district court held that the permission to reject was proper in any event.

In the meantime, the union had filed unfair labor practices charges with the NLRB complaining that Bildisco had refused to grant certain wage increases, to pay pension and welfare contributions, or to turn over union dues, all in violation of the collective bargaining agreement. After investigating the charges,

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I don't know under the Code what power the court has to disapprove an application to reject a contract, unless it can be shown it was a promiscuous act on the part of the debtor, and it was really a beneficial contract.

It is surely not a beneficial contract if it costs him $132 a week, which is my own computation, more than he would have to pay if he didn't have the contract.

Under the circumstances I am going to have to allow the motion of the debtor.

App. at 62-63. Subsequently, the following dialogue took place:

COUNSEL FOR THE UNION: Just for the record, your Honor, with respect to the ruling today, it is your position, your Honor—and correct me if I am wrong—the cases prior to the enactment of the Bankruptcy Code, those cases dealing with special considerations given collective bargaining are no longer applicable?

. . . .

THE COURT: All I am saying is this is not a case under the Bankruptcy Act; it is under the Bankruptcy Code.

Under Section 365 I have to grant the motion to reject.

App. at 64-65.

the General Counsel of the NLRB issued a complaint on July 31, 1980, alleging that Bildisco, and Bildisco as debtor-in-possession, had engaged in unfair labor practices in violation of sections 8(a)(1) and (5) of the National Labor Relations Act by making unilateral changes in the collective bargaining agreement. The complaint advised Bildisco that a hearing had been scheduled for March 9, 1981, more than seven months later, and that if Bildisco did not answer the complaint within ten days of service, all of the allegations would be deemed admitted. On September 24, 1980, a Board agent advised Valente of the company's obligation to answer the complaint. On October 8, the General Counsel issued an amended complaint reflecting additional union allegations that the company had failed to pay vacation benefits to its employees. On October 27, 1980, a Board attorney informed Valente by telephone and by letter that he would seek summary judgment if no answer to the amended complaint were received by October 31. No answer was filed.

On January 27, 1981, twelve days after the bankruptcy court authorized rejection of the collective bargaining agreement, the Board's General Counsel moved for summary judgment based on Bildisco's failure to answer the amended complaint. Two days later Bildisco responded with a request for a 60-day stay of proceedings so that it could apply for bankruptcy court permission to retain special labor counsel. The General Counsel opposed this request.

On February 9, 1981, the Board issued a notice to show cause why summary judgment should not be granted. Bildisco responded on February 20 that its delay in filing an answer was caused by the disruption of Chapter 11 proceedings and that it had not yet received bankruptcy court permission to retain

special labor counsel.[4] It also informed the Board that the bankruptcy court had granted its motion for permission to reject the collective bargaining agreement. Noting the retroactive effect of the rejection, the debtor-in-possession argued that no contract existed between it and the union after April 14, 1980. It argued also that any unpaid contributions due prior to the petition did not constitute unilateral changes in the contract, but were claims subject to allowance in Bildisco's Chapter 11 proceeding.

On April 23, 1981, stating that Bildisco had not shown good cause for failing to file a timely answer, the Board granted the General Counsel's motion for summary judgment, notwithstanding its notification two months earlier that the bankruptcy court had permitted Bildisco to reject the agreement. The order, addressed to "Bildisco and Bildisco, debtor-in-possession," required Bildisco to make all the delinquent contributions and payments plus interest, to honor the terms of the collective bargaining agreement, and to post appropriate notices. The NLRB made a "finding of fact" that the debtor-in-possession "is, and has been at all times material herein since April 17, 1980, an alter ego in bankruptcy to Bildisco." App. at 131.[5] The Board subsequently applied to this court for enforcement of its order.

We granted the Board's motion to consolidate the two cases. The Board has intervened in the union's appeal from the district court order, and the union

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[4] The bankruptcy court granted Bildisco this permission on April 16, 1981.

[5] The respondent filed a motion for reconsideration accompanied by an answer to the Board's complaint; the Board rejected the motion because it was postmarked two days after the deadline for such motions. *See* 29 C.F.R. § 102.48(d)(2).

has intervened in the Board's application for enforcement. We will consider the appeal and the application for enforcement in turn.

II.

The rejection of a collective bargaining agreement under the new Bankruptcy Code, which implicates a significant confrontation of labor and bankruptcy policies, is a matter of first impression in the courts of appeals. Nevertheless, we have the benefit of both statutory direction and the decisions of other courts interpreting the equivalent section of the former Bankruptcy Act and the relevant provisions of the NLRA.

A.

Underlying Chapter 11 of the Code is a legislative policy to provide opportunities for a debtor to reduce or extend debts so that it can return to financial viability.

> The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. The premise of a business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap. Often, the return on assets that a business can produce is inadequate to compensate those who have invested in the business. Cash flow problems may develop, and require creditors of the business, both trade creditors and long-term lenders, to wait for payment of their claims. If the business can extend or reduce its debts, it often can be

> returned to a viable state. It is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 220 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6179. If a business can be turned around by reorganization, its creditors will recover more on their claims than in a Chapter 7 liquidation,[6] its employees will keep their jobs, and the public will continue to benefit from its production. Thus the debtor, its creditors and employees, and the public at large benefit from the business' survival. Under the congressional schema, this goal is promoted by numerous specific mechanisms, including continued operation in the hands of the debtor-in-possession or trustee, under supervision of the court, with a "breathing spell" free from the collections efforts of creditors. Another mechanism is to allow the debtor-in-possession to reject executory contracts that would burden the estate. *See* 2 Collier on Bankruptcy ¶¶ 365.01-03 (15th ed. 1981). *See generally Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 318 U.S. 523, 549-51 (1943); *Sparhawk* v. *Yerkes*,

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[6] Experience under the Bankruptcy Act demonstrated that creditors received larger portions of their claims from reorganization proceedings than from liquidations. According to tabulations taken from a sample of bankruptcy cases, priority creditors usually received full payment in a successful reorganization but realized less than one-third of the amount of their claims in a straight bankruptcy. Unsecured creditors realized only a median nineteen percent under one-payment plans and ten percent under deferred payment plans when the debtor went through reorganization, but in straight bankruptcies the median was only eight percent. D. Stanley & M. Girth, Bankruptcy: Problem, Process, Reform 129-30, 142-43 (1971).

142 U.S. 1, 13 (1891); *In re Italian Cook Oil Corp.*, 190 F.2d 994 (3d Cir. 1951).

Section 365(a) of the Code provides, with exceptions not now relevant, that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." [7] Under Chapter 11 a debtor-in-possession has essentially the same powers as a trustee,[8] and it therefore may reject executory contracts with the authorization of the bankruptcy court.

B.

This case places the statutory policies underlying Chapter 11 in tension with our national labor policy, as expressed in the National Labor Relations Act. Broadly stated, that policy is to promote industrial peace by facilitating collective bargaining. Sections 7 and 8 of the NLRA, 29 U.S.C. §§ 157 and 158, guarantee the rights of workers to organize and to bargain collectively and protect both employees and employers from unfair labor practices that undermine these rights.

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[7] The analogous provision of the Bankruptcy Act stated:

> Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties conferred and imposed upon it by this chapter—
>
> (1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interests as the court may designate. . . .

Bankruptcy Act of 1898, § 313, 11 U.S.C. § 713 (1976) (repealed).

[8] 11 U.S.C. § 1107. Under certain circumstances the court may appoint a trustee to operate the business. 11 U.S.C. §§ 1104, 1108.

The specific statute relied on by the union and the Labor Board is § 8(d) of the NLRA, which provides that no party to a collective bargaining agreement may "terminate or modify" the agreement without following a specified procedure.[9] Our task is to reconcile the apparent conflict between the NLRA and the Bankruptcy Code and the policies they represent.

III.

In enacting § 365, Congress provided no indication that collective bargaining agreements were to be immune from rejection and thus unique among executory contracts. Indeed, the few inferences of congressional intent that may be gleaned from the Code and

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[9] Termination or modification of a collective bargaining agreement is permitted by § 8(d) only if the moving party

> (1) serves a written notice upon the other party to the contract . . .;
>
> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
>
> (3) notifies the Federal Mediation and Conciliation Service . . . and . . . any State or Territorial agency established to mediate and conciliate disputes within the State or Territory . . .;
>
> (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: . . . [T]he duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

29 U.S.C. § 158(d).

its legislative history are to the contrary. First, notwithstanding several judicial decisions holding collective bargaining agreements susceptible to rejection,[10] Congress afforded collective bargaining agreements no special treatment. Significantly, Congress did provide detailed provisions for acceptance of executory contracts such as shopping center leases, § 365(b)(3), and regarding transactions in commodities futures contracts, §§ 765, 766. Moreover, one particular species of collective bargaining agreement was singled out:

> Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act (45 U.S.C. 151 et seq.) except in accordance with section 6 of such Act (45 U.S.C. 156).

11 U.S.C. § 1167. The sheer complexity of the Bankruptcy Reform Act might preclude our use of § 1167 as definitive proof that every other collective bargaining agreement may be rejected, but the section permits an inference that, with this one exception, Congress did not intend to distinguish collective bargaining agreements from executory contracts in general.

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[10] *See, e.g., Truck Drivers Local Union No. 807* v. *Bohack Corp.*, 541 F.2d 312 (2d Cir. 1976); *Brotherhood of Railway, Airline and Steamship Clerks* v. *REA Express, Inc.*, 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017, 1073 (1975); *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975); *Local Joint Executive Board, AFL-CIO* v. *Hotel Circle, Inc.*, 419 F.Supp. 778 (S.D. Cal. 1976), *aff'd*, 613 F.2d 210 (9th Cir. 1980).

IV.

Having determined that § 365(a) authorizes the bankruptcy court to permit the rejection of collective bargaining agreements, we now turn to the standards it should use in considering such a request. We begin by rejecting the concept that the proceeding under § 8(d) of the NLRA is mandated. As more fully developed in Part VI-A, *infra*, a debtor-in-possession is a new entity, separate and apart from the pre-bankruptcy company, and does not become a party to an executory contract unless it assumes the contract. Bildisco, as a debtor-in-possession, was not a party to the collective bargaining agreement, and therefore not bound by § 8(d). *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F.2d 698, 704 (2d Cir. 1975). The burden of persuading the bankruptcy court to permit rejection of a collective bargaining agreement must be placed on the moving party: the debtor-in-possession or the trustee. Our critical task is to establish the extent of that burden.

A.

The usual test for rejection of an executory contract is simply whether rejection would benefit the estate, the "business judgment" test. *See* 2 Collier on Bankruptcy ¶ 365.03 (15th ed. 1981). The impact of rejection of a collective bargaining agreement on the rights of workers and the favored status those rights have been accorded by Congress, however, require a more stringent examination of the evidence offered to justify rejection of such a contract. The second circuit in *Kevin Steel*, speaking through Judge Feinberg, accommodated the interests of the workers by holding that rejection of a collective bargaining agreement requires " 'thorough scrutiny, and a care-

ful balancing of the equities on both sides.'" 519 F.2d at 707 (quoting *In re Overseas National Airways, Inc.*, 238 F.Supp. 359, 361 (E.D.NY. 1965)).

We accept this formulation of the appropriate relationship between the competing statutory policies. It accommodates the statutory policies of the Labor Act by demanding a greater evidentiary showing than for rejection of a typical executory contract, but it does not erect impossible barriers to rejection of labor contracts in violation of the policies underlying Chapter 11. It plots a middle course between the possible extremes, requiring a sensitive weighing of the competing private and public interests in the context of the particular case.

We reject, however, the formulations of subsequent decisions pressed on us by the union and the Board, which purport to follow the rule of *Kevin Steel* but instead replace its "balancing of the equities" with a test predicating permission to reject on a showing "that an onerous and burdensome executory collective bargaining agreement will thwart efforts to save a failing carrier in bankruptcy from collapse." *Brotherhood of Railway, Airline and Steamship Clerks* v. *REA Express, Inc.*, 523 F.2d 164, 169 (2d Cir.), *cert. denied*, 423 U.S. 1017, 1073 (1975).[11] Accord-

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[11] They reflect a phenomenon that our distinguished, former colleague, the late William H. Hastie, called "trampling upon graves": adding a substantial gloss to a previously stated holding but improperly citing the former case as the authority for the new formulation. Of course, the development of the law often consists of adding gloss to previous cases, as Cardozo described it: "Given a mass of particulars, a congeries of judgments on related topics, the principle that unifies and rationalizes them has a tendency, and a legitimate one, to project and extend itself to new cases within the limits of its

ing to *REA Express*, rejection should be permitted "only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, the carrier will collapse and the employees will no longer have their jobs." *Id.* at 172. The district court in this case and the court in *In re Alan Wood Steel Co.*, 449 F.Supp. 165 (E.D.Pa. 1978), *appeal dismissed*, 595 F.2d 1211, 1214 (3d Cir. 1979), apparently building on *REA Express* and *In re Penn Fruit Co.*, 92 L.R.R.M. (BNA) 3548 (E.D. Pa. 1976), declared that *Kevin Steel* required a two step analysis:

> First, the court should determine that the agreement is onerous and burdensome to the estate, *so that failure to reject will make a successful arrangement impossible.* Second, the equities must be balanced and found to favor the debtor. Then, and only then, may rejection of a collective bargaining agreement be permitted.

449 F. Supp. at 169, *quoted in* district court op. at 4-5 (emphasis added).

The italicized portion of the first step, in our view, goes well beyond the "balancing of equities" required by *Kevin Steel*. We reject this more stringent test for two discrete but related reasons: first, for the pragmatic reason that it may be impossible to predict the success *vel non* of a reorganization until very late in the arrangement proceedings; and second, for the prudential consideration that the imposition of such a test unduly exalts the perpetuation of the collective bargaining agreement over the more pragmatic con-

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capacity to unify and rationalize." B. Cardozo, The Nature of the Judicial Process 31 (1921). But it is quite another thing to disguise an expansion of the law by pretending that the court is simply applying a previously stated rule of law.

sideration of whether the employees will continue to have jobs at all.

At the date of oral argument in these proceedings, March 19, 1982, Bildisco was still operated by a debtor-in-possession under the supervision of the bankruptcy court. Thus almost two years after the petition for reorganization was filed and over a year after the court granted the debtor-in-possession permission to reject the agreement, there is still no assurance that Bildisco will successfully reorganize. We simply do not and cannot know whether it will be forced into liquidation. It is entirely unrealistic to require the bankruptcy court at an early stage of a reorganization proceeding to predict whether reorganization will be impossible absent rejection of the labor contract. In the common law tradition the acceptability or durability of a legal rule is directly dependent upon its utility. The rule urged upon us by the NLRB and the union appears to us deficient because we know of no formula readily available to a bankruptcy court in an early stage of a Chapter 11 reorganization that could reasonably predict whether a business reorganization will succeed.

We also reject the more stringent test because it could work to the detriment of the workers it seeks to protect. By erecting an excessive evidentiary barrier to rejection of labor contracts, the *REA Express-Alan Wood Steel* formulation would make it likely that numerous businesses attempting to reorganize will in fact be forced over the line into liquidation. Adherence to a collective bargaining agreement together with a successful reorganization is surely the best of possible worlds; but given the inevitable potential for conflict between these goals we think it preferable that jobs be preserved through rejection of

a labor contract than that they be lost because of its acceptance.

In the multiplicity of fact situations that will arise, we think our best option is to require the bankruptcy courts to undertake a "thorough scrutiny, and a careful balancing of the equities on both sides" as set forth in *Kevin Steel*. Each case will present its own complexities. For example, the bankruptcy court must understand that the debtor-in-possession who rejects a collective bargaining agreement remains an employer and is still required by the NLRA to bargain with the representatives of its employees, *Kevin Steel*, 519 F.2d at 704, and that its employees retain their right to strike should negotiations fail, *see In re Ryan Co.*, 83 Lab.Cas. (CCH) ¶ 10,487 at 17,952 n.2 (D.Conn. 1978). The consequences of a strike on a precarious business therefore must be one factor to be weighed by the bankruptcy court. Moreover, because under § 365(g) rejection constitutes a breach of contract, the employees may assert a claim for the value of the benefits lost. The court should consider both the impact of the resulting claim against the debtor and the adequacy of the relief employees might obtain through the claims procedures.[12]

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[12] Among other factors bankruptcy courts might consider in balancing the equities are, for example, the proportion of the debtor's employees covered by the collective bargaining agreement, how those employees' wages and benefits compare to those of others in the industry, and the good or bad faith of the parties in dealing with the effect of the company's insolvency on its labor obligations. *See* Note, *The Bankruptcy Law's Effect on Collective Bargaining Agreements*, 81 Colum. L. Rev. 391, 401-03 (1981). The listing of these considerations is not intended to be all-inclusive.

B.

We are satisfied that *Kevin Steel*, isolated from its illegitimate progeny, provides the appropriate framework for an intelligent and equitable approach to the problem because it gives collective bargaining agreements a measure of protection beyond that available under the business judgment test without unduly advancing the interests served by the Labor Act over the other interests of the employees and those of the debtor's other creditors. We believe that the debtor-in-possession must first demonstrate that the continuation of the collective bargaining agreement would be burdensome to the estate; that once this threshold determination has been made the debtor-in-possession must make a factual presentation sufficient to permit the bankruptcy court to weigh the competing equities; that the polestar is to do equity between claims which arise under the labor contract and other claims against the debtor; that, in this, the court must consider the rights of covered employees as supported by the national labor policy as well as the possible "sacrifices which other creditors are making" in the effort to bring about a successful reorganization, *Group of Institutional Investors*, 318 U.S. at 550; and that the court must make a reasoned determination that rejection of the labor contract will assist the debtor-in-possession or the trustee to achieve a satisfactory reorganization. We believe that particularly in a time of economic uncertainty and distress an analysis following this pattern provides more protection to both employer and employee than the test urged upon us by the union and the NLRB.[13]

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[13] According to data supplied by the U.S. Department of Labor, as of February, 1982, 9.6 million Americans wanting to work were unable to find jobs. This constitutes 8.8% of

V.

Having identified the considerations properly applicable to rejections of collective bargaining agreements, we turn to the appeal at No. 81-2140; and we begin by examining the arguments presented to the bankruptcy court. The union argued that the proper test was that articulated in *REA Express* and *Alan Wood Steel:* rejection is permissible only if reorganization otherwise would be impossible and if the equities favor the debtor. Counsel for the debtor-in-possession, on the other hand, submitted that collective bargaining agreements are to be treated like all other executory contracts and that rejection should be permitted whenever it would benefit the debtor.

The bankruptcy court's bench opinion unfortunately was a woefully inadequate treatment of a sophisticated subject. It is not clear whether the bankruptcy court chose one of the two standards

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the work force and an increase from 3.4% in January-March 1969, 4.6% in October 1973, and 5.7% in May-July 1979. Because Bildisco is involved in the building supply business, a business directly associated with the construction business, and the employees who are covered by the labor contract are warehousemen, drivers, mechanics, and outside field servicemen, it is significant that 18.1% of the nation's construction workers were unemployed compared with 12.5% of blue-collar workers in general. U.S. News & World Report, March 15, 1982, at 71-73. Under circumstances of a distressed economy, a bankruptcy court could properly consider that it would be in the interests of the workers in a bargaining unit to be afforded the opportunity to continue to work under less generous financial benefits than to insist upon an absolute payment of vacation benefits, pension, health and welfare benefits, and wage increases. In weighing the equities the court could well conclude that it is in the public interest for employees to work without the advantage of fringe benefits than not to work at all.

proffered by the parties or applied a synthesis of the two.[14] Where the state of the law is settled there are three critical prerequisites to a determination of reversible error: (a) specific acts or omissions by the trial court constituting legal error, (b) properly suggested as error to the trial court, and (c), if uncorrected on that level, then properly presented for review to the appellate court. Assuming that the trial court erred, for there to be reversible error, we must be able to determine that appellant properly identified the error and requested the trial court to take a legally appropriate course of action. *Pfeifer* v. *Jones & Laughlin Steel*, —— F.2d ——, —— n.1, No. 81-1928 (3d Cir. April 16, 1982), slip op. at 6 n.1. In the district courts, Fed.R.Civ.P. 46 requires a party to "[make] known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor." This requirement affords an opportunity for error correction and avoidance in the trial court in various ways: It gives the adversary the opportunity either to avoid the challenged action or to present a reasoned defense of the trial court's action, and it provides the trial court with the alternatives of modifying its decision or of ordering a more fully developed record for review. It also challenges the court to articulate the grounds for its decision and thus facilitates appellate review.

Where the state of the law is not settled, and the court of the first instance has not set forth a reasoned

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[14] The district court affirmed the bankruptcy court by determining that, applying either test, the contract was appropriately rejected. The district court's analysis need not detain us, however, because our role as a court of review is identical to that of the district court. *Universal Minerals, Inc.* v. *C.A. Hughes & Co.*, 669 F.2d 98, 101-02 (3d Cir. 1981).

elaboration for its decision, as here, an appellate court cannot determine what motivated the trial court's decision. It cannot properly determine whether there was a specific act or omission constituting legal error. Even though an appellate court can affirm on the basis of reasons different from those set forth by the trial court, *Rhoads* v. *Ford Motor Co.*, 514 F.2d 931 (3d Cir. 1975), a reviewing court cannot properly perform its function until the parties are given the opportunity to prepare a record and the trial court the opportunity to apply in the first instance newly formulated precepts to the facts adduced. Because we have set forth in detail the appropriate precepts to apply in a hitherto unsettled area of the law, and because we do not have the benefit of an adequate explanation of the trial court's action, the preferable course is to remand the proceedings for reconsideration in light of the precepts we announce today. Accordingly, we vacate the judgment of the district court and remand to it with a direction that the cause be further remanded to the bankruptcy judge for reconsideration.

VI.

We now turn to the Board's application at No. 81-2238 for the enforcement of its summary judgment determining that the debtor-in-possession had committed an unfair labor practice.

It must be emphasized that we are not faced with an application for enforcement of an NLRB order entered after reception of evidence by an administrative law judge and a review of the record by the Board. We have only an application for enforcement of summary judgment; our denial of enforcement does not preclude the Board from processing the

charges through a full hearing, guided and governed by the bankruptcy court's determination on remand concerning the rejection of the collective bargaining agreement, and by the views which we have expressed in this opinion.

A.

The basis of the unfair labor practice charges is an allegation that the debtor-in-possession unilaterally changed the terms of the collective bargaining agreement and thereby failed to bargain in good faith, in violation of sections 8(a)(1) and (5) of the NLRA. The Board's theory depends upon its contention that the debtor-in-possession is an alter ego of the debtor and thereby a party to the collective bargaining agreement. The Board's argument fails, however, because, as a matter of law, a debtor-in-possession is "[a] new entity . . . created with its own rights and duties, subject to the supervision of the bankruptcy court." *Kevin Steel*, 519 F.2d at 704 (footnote omitted). A debtor-in-possession is given powers comparable to those of a trustee, and it is thus an officer of the court. 11 U.S.C. § 1107. As the House and Senate Reports explaining § 1107 emphasize:

> This section places a debtor in possession in the shoes of a trustee in every way. The debtor is given the rights and powers of a chapter 11 trustee. He is required to perform the functions and duties of a chapter 11 trustee (except the investigative duties). He is also subject to any limitations on a chapter 11 trustee, and to such other limitations and conditions as the court prescribes.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 404 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963,

6360; S. Rep. No. 989, 95th Cong., 1st Sess. 116 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5902. The debtor-in-possession's position is analogous to that of a successor employer: it may be required to recognize and bargain with the union, but it is not a party to its predecessor's collective bargaining agreement unless it assumes that agreement. *NLRB* v. *Burns Security Services, Inc.*, 406 U.S. 272, 284 (1972); *Kevin Steel*, 519 F.2d at 704. Because Bildisco as debtor-in-possession is not a party to the agreement with Local 408, it had the ability to reject the agreement without following the procedures outlined in § 8(d). We suggest to the NLRB that, at least in matters within this judicial circuit, it cease operating under such a fundamental misconception of the law. Indeed, we believe that persisting in such a misconception—one that goes to the difference between the pre-bankruptcy company which was the signatory to the collective bargaining agreement and the succeeding debtor-in-possession—is so fundamental that this error in and of itself is sufficient reason to refuse to enforce a summary judgment so predicated.

B.

The Board contends, however, that this court may not consider Bildisco's defenses to the unfair labor practice complaint because they were not urged before the Board in a timely manner. Section 10(e) of the NLRA, 29 U.S.C. § 160(e), provides that "[n]o objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances"; and the Supreme Court has consistently held that, in the absence of extraor-

dinary circumstances, "the failure or neglect of a respondent to urge an objection in the Board's proceedings forecloses judicial consideration of the objection in enforcement proceedings." *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961). The Board contends that the debtor-in-possession's sole excuse for its failure to file an answer was the disruption in its operations caused by reorganization proceedings, and that this excuse would not come within § 10(e)'s "extraordinary circumstances" exception.

We hold that § 10(e) is inapplicable to this case because the objection was urged before the Board at a time when the Board could have taken meaningful notice of it. Inasmuch as the date of the hearing had not yet passed, the Board's draconian remedy was unwarranted. We have recently observed that

> an administrative agency like the NLRB, burdened with an extremely heavy caseload, must necessarily rely upon compliance with procedural rules to function efficiently. As part of the process, reasonable time limitations must be set and observed. Nevertheless, there are instances where wooden and unreasoning insistence upon technical procedural rules results, not in the proper disposition of a cause, but in injustice. Failure to take remedial measures when such incidents occur constitutes an abuse of discretion.

Livingston Powdered Metal, Inc. v. *NLRB*, 669 F.2d 133, 137 (3d Cir. 1982). We recognize that the response to the complaint here was exceedingly tardy, more so than in *Livingston* or its companion case of *Kessler Institute for Rehabilitation* v. *NLRB*, 669 F.2d 138 (3d Cir. 1982). But in *National Book Consolidators, Inc.* v. *NLRB*, 672 F.2d 323 (3d Cir.

1982), we required the Board to "utilize a 'good cause' standard in determining whether to accept filing of an answer," explaining that " '[t]he purpose of the "good cause" standard . . . is to ensure that the Board makes decisions on the merits despite technical and inadvertent noncompliance with procedural rules.' " *Id.* at 326 (quoting *NLRB* v. *Zeno Table Co.*, 610 F.2d 567, 569 (9th Cir. 1979)).

We do not suggest that the mere fact that a debtor-in-possession is implicated in the proceedings is itself sufficient reason for a delay. But the drastic circumstances here, where a work force of eighteen union members had been reduced to three in a business intimately associated with the construction industry, one of the most distressed industries of the present recession, and where the pre-bankruptcy company had been in active reorganization by a debtor-in-possession for over a year, we believe that the Board was presented with a "good cause" for accepting an untimely response and proceeding to consider what appears to us to be a most persuasive argument on the merits.

The timetable is significant. The amended complaint was filed October 8, 1980, and set a March 9, 1981, hearing date. On February 20, 1981, responding to the Board's order to show cause, Bildisco notified the Board that the bankruptcy court had entered an order on January 15, 1981, granting its motion to reject the labor contract. We do not condone the failure of the debtor-in-possession to respond to the complaint, but we will not enforce a Board order that cavalierly refuses to recognize an outstanding federal court order directly relating to the proceedings before it. Because rejection related back to the day before the Chapter 11 petition was filed, 11 U.S.C. § 365(g)(1), no labor contract effectively existed be-

tween the union and the debtor-in-possession, subsequent to April 14, 1980. In its thirteen page decision and order dated April 23, 1981, however, the Board failed even to acknowledge, much less to consider the effect of, the bankruptcy court order permitting rejection.

The Board did not explain how, as an agency of the executive branch, it can ignore the order of a federal court. We perceive no excuse for this disregard. It is as much a departure from acceptable decision-making for the NLRB to decide a case within its competence without accommodating competing principles of bankruptcy law as it would be for a bankruptcy court to decide a labor contract issue without accommodating competing principles of our national labor policy. Whatever the debtor-in-possession's technical breach of the NLRB's procedural rules, it does not excuse the agency's refusal to recognize the existence of the outstanding bankruptcy court order and to give some explanation why that order would be irrelevant to its proceedings.

We therefore conclude, for all the foregoing reasons, that the NLRB both erred as a matter of law and misused its discretion in granting the motion for summary judgment. Because the summary judgment included pre-petition charges as well as those relating to activities subsequent to the filing of the bankruptcy petition, it will be for the NLRB in the first instance to separate the two types of charges at any subsequent proceeding. Where charges of unfair labor practices arise both before and after the date of a Chapter 11 petition, the rejection of a collective bargaining agreement would not affect the obligations of the employer under § 8(d) prior to the date of the petition. We agree with the Board that a monetary

claim resulting from a Board order in such circumstances is governed by bankruptcy law and may be filed as the claim of a creditor in the bankruptcy court. *See* Reply Br. at 7.

It would seem, however, that the Board must await the determination of the bankruptcy court on remand before it may proceed to consider the post-petition charges. If under the precepts we announce today the bankruptcy judge again permits the rejection of the collective bargaining agreement, the Board will be bound by that determination, which would preclude any post-petition unfair labor practice arising from the rejected agreement.

VII.

The judgment of the district court at No. 81-2140 will be vacated and the cause remanded to it with a direction of a further remand to the bankruptcy judge for reconsideration in light of the foregoing. The NLRB's application for enforcement at No. 81-2238 will be denied without prejudice, for the reasons hereinabove expressed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2140 and 81-2238

IN RE: BILDISCO, A General Partnership of the State of New Jersey,

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, APPELLANT, No. 81-2140
NATIONAL LABOR RELATIONS BOARD, INTERVENOR

Appeal from the United States District Court for the District of New Jersey
(D.C. Civil No. 81-0513)

NATIONAL LABOR RELATIONS BOARD, PETITIONER, No. 81-2238

VS.

BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, RESPONDENT

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INTERVENOR

National Labor Relations Board
Application for Enforcement

Present: ALDISERT, VAN DUSEN and GARTH, *Circuit Judges.*

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the District of New Jersey and from the National Labor Relations Board and were argued by counsel on March 19, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered May 6, 1981, be, and the same is hereby vacated and the cause remanded to the said District Court for further remand to the Bankruptcy Court for reconsideration in light of the opinion of this Court.

It is further ordered and adjudged that the National Labor Relations Board's application for enforcement, filed August 6, 1981, be, and the same is hereby denied.

Costs taxed against petitioner in C.A. No. 81-2238.

ATTEST:

/s/ Sally Mrvos
Clerk

June 17, 1982

APPENDIX C

255 NLRB No. 154

FJZ

D—7640
Avenel, NJ

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 22—CA—10061

BILDISCO AND BILDISCO,
DEBTOR IN POSSESSION

and

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

Upon a charge and amended charges filed on June 3, July 16, and August 28, 1980, respectively, by Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Bildisco and Bildisco, Debtor in Possession, herein collectively called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 22, issued a complaint and notice of hearing on July 31, 1980, and a first amended complaint and notice of hearing on October 8, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8

(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charges and complaints and notices of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that the Union is the exclusive representative of certain of the Respondent's employees in a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act,[1] and that since on or about January 3, 1980, and at all times thereafter, Respondent has refused and is now refusing to bargain collectively with the Union by unilaterally changing existing terms and conditions of employment of its employees in the appropriate unit, as contained in its collective-bargaining agreement with the Union, regarding remittance of union dues, payment of pension, health, and welfare contributions, and payment of vacation benefits and wage increases. Respondent failed to file a timely answer to the complaint.

On February 2, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment based upon Respondent's failure to file an answer as required by Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended. In a response to the General Counsel's motion, Respondent requested a 60-day stay of these proceedings to allow it to apply to the United States

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[1] All warehousemen, drivers and mechanics including straight truck drivers, outside field servicemen, order pickers, helpers, working foremen, employed at Respondents' Avenel place of business, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

Bankruptcy Court for authorization to retain special counsel to represent it in these proceedings. Counsel for the General Counsel opposed Respondent's request. Subsequently, on February 9, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Thereafter, Respondent filed a response to the Notice To Show Cause, including affirmative defenses, and counsel for the General Counsel filed a response to Respondent's response.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides as follows:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The complaints and notices of hearing served on Respondent herein specifically state that unless an answer to the complaint is filed within 10 days of service thereof "all of the allegations contained in the

Complaint shall be deemed to be admitted to be true and may be so found by the Board." Further, according to the uncontroverted allegations of the Motion for Summary Judgment, a Board agent met with Sal Valente, a general partner of Respondent, on September 24, 1980, and informed him of his obligation to file an answer, which was already past due, to the complaint issued on July 31. By letter dated October 27, 1980, a Board agent, confirming a telephone conversation of that date, advised Valente that no answer had been received to the first amended complaint and that summary judgment would be sought if no answer was received by October 31, 1980.

In its response to the Notice To Show Cause, Respondent states that its failure to file an answer was due to the disruption in its operations caused by its reorganization proceedings in the United States Bankruptcy Court. Respondent further states that it is currently attempting to obtain court approval to retain special labor counsel but has not to date received the requisite order from the court. In his response, counsel for the General Counsel states, as he did in his response to Respondent's letter of January 29, 1981, that Respondent had more than 6 months to file an answer or seek an extension of time to file an answer in order to obtain court authorization to employ labor counsel, and failed to do so.

As indicated above, Respondent was served with the complaint and first amended complaint on July 31 and October 8, 1980, respectively, at which times it was engaged in proceedings before the bankruptcy court. It was notified several times of its obligation to file an answer or to request an extension of time to do so, but failed to do either. The response to the Notice To Show Cause does not explain why Re-

spondent failed to contact the Regional Office concerning an answer or an extension of time to file an answer. Accordingly, we find that Respondent's response does not constitute good cause under our rules for its failure to file a timely answer.[2] Therefore, in accordance with the rule set forth above, the allegations of the first amended complaint are deemed to be admitted to be true and are so found by the Board, and the General Counsel's Motion for Summary Judgment is granted.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Bildisco, a partnership duly organized under, and existing by virtue of, the laws of the State of New Jersey, with its principal office and place of business in Avenel, New Jersey, is and has been at all times material herein continuously engaged in the retail and wholesale sale and distribution of building and supply products. During the 12-month period ending June 3, 1980, Bildisco caused to be purchased, transferred, and delivered to the Avenel place of business building supplies and other materials valued in excess of $50,000, of which goods and materials valued in excess of $50,000 were transported to the Avenel place of business directly from points outside the State of New Jersey. Since on or about April 17, 1980, Bildisco has been duly designated as Debtor-in-Possession for Bildisco pursuant to a voluntary arrangement pro-

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[2] See *World Services Corporation and/or Peggs Coal Company; and World Services Corporation, Debtor In Possession*, 247 NLRB No. 201 (1980); *Evans Express Company, Inc. and Intercontinental Systems, Inc.*, 232 NLRB 655 (1977).

ceeding in the United States Bankruptcy Court of the District of New Jersey, and as such has full authority to continue the operation of and exercise all powers necessary to the administration of the business of Bildisco.

We find, on the basis of the foregoing, that Bildisco, Debtor-in-Possession, is, and has been at all times material herein since April 17, 1980, an alter ego in bankruptcy to Bildisco and that Bildisco and Bildisco, Debtor-in-Possession, collectively called Respondent, is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All warehousemen, drivers and mechanics including straight truck drivers, outside field service men, order pickers, helpers, working foremen, employed at Respondent's Avenel place of business, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

On or before May 1, 1979, a majority of the employees of Respondent in the unit described above designated and selected the Union as their representative for the purpose of collective bargaining, and since on or before May 1, 1979, the Union has been and is now, pursuant to Section 9(a) of the Act, the exclusive representative of the employees in the unit described above for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. As a result of the representative status of the Union, Respondent and the Union have entered into successive collective-bargaining agreements, the most recent of which is effective from May 1, 1979, through April 30, 1982.

Since on or about January 3, 1980, Respondent has unilaterally changed existing terms and conditions of employment of its employees in the unit described above by failing and refusing to: make required pension, health, and welfare contributions; remit to the Union the dues withheld from the pay of employees; and pay vacation benefits, all as required by the collective-bargaining agreement described above. Since on or about May 1, 1980, Respondent has unilaterally changed existing terms and conditions of employment of its employees in the unit described by failing and refusing to pay wage increases as required by the collective-bargaining agreement.

Accordingly, we find that by the aforesaid conduct Respondent has failed and refused, and is now failing and refusing, to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit. By such conduct, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Such affirmative action shall include that Respondent recognize and deal with the Union as the exclusive bargaining representative of its employees in the appropriate unit by honoring the collective-bargaining agreement executed by it on May 1, 1979, in all its terms.

Additionally, we have found that Respondent has made unilateral changes in certain terms and conditions of employment in violation of Section 8(a)(5) and (1) of the Act. In order to dissipate the effect of these unfair labor practices, we shall order Respondent to make whole its employees by making the required pension, health, and welfare contributions that it has failed to pay since January 3, 1980,[3] re-

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[3] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of

mitting to the Union the dues it has withheld from its employees' paychecks since January 3, 1980, paying the vacation benefits it has failed to pay since January 3, 1980, and paying the wage increases it has failed to pay since May 1, 1980, plus interest on the dues, vacation benefits, and wage increases as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[4]

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Bildisco and Bildisco, Debtor-in-Possession, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of

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interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Company*, 240 NLRB 1213, 1216, fn. 7 (1979).

[4] See *Ogle Protection Service, Inc. and James L. Ogle*, 183 NLRB 682, 683 (1970); and see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB No. 11 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All warehousemen, drivers and mechanics including straight truck drivers, outside field service men, order pickers, helpers, working foremen, employed at Respondent's Avenel place of business, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the above-named labor organization has been and now is the exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By unilaterally failing and refusing, since on or about January 3, 1980, and at all times thereafter, to make required pension, health, and welfare contributions, to remit to the Union the dues withheld from its employees' pay, and to pay vacation benefits, and by unilaterally failing and refusing since on or about May 1, 1980, and at all times thereafter, to pay wage increases to its employees, all as required by its collective-bargaining agreement with the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Rela-

tions Board hereby orders that the Respondent, Bildisco and Bildisco, Debtor-in-Possession, Avenel, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

> All warehousemen, drivers and mechanics including straight truck drivers, outside field service men, order pickers, helpers, working foremen, employed at Respondent's Avenel place of business, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Failing and refusing to make pension, health, and welfare contributions, to remit to the Union dues withheld from its employees' pay, to pay vacation benefits, and to pay wage increases, all as required by its collective-bargaining agreement with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Recognize and bargain with the Union as the exclusive representative of its employees in the aforesaid appropriate unit by honoring the collective-bargaining agreement executed by it on May 1, 1979, in all its terms.

(b) Make whole its employees, in the manner set forth in the section of this Decision entitled "The Remedy," by making the required pension and health

and welfare contributions it has failed to pay since January 3, 1980, by remitting to the Union the dues it has withheld from its employees' pay since January 3, 1980, plus interest, by paying the vacation benefits it has failed to pay since January 3, 1980, plus interest, and by paying to employees any wage increases it has failed to pay since May 1, 1980, plus interest, all as required by its collective-bargaining agreement with the Union.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of money due under the terms of this Order.

(d) Post at its Avenel, New Jersey, place of business copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. April 23, 1981.

JOHN H. FANNING, Chairman

HOWARD JENKINS, JR., Member

DON A. ZIMMERMAN, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of all warehousemen, drivers, and mechanics including straight truck drivers, outside field service men, order pickers, helpers, working foremen, employed at our Avenel place of business, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally change existing terms and conditions of employment of our employees in the above-described unit by failing and refusing to make pension, health, and welfare contributions, to remit to the Union the dues withheld from our employees' pay, to pay vacation benefits, and to grant wage increases, all as required by our collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and bargain with the Union as the exclusive representative of our employees in the above-described unit by honoring the collective-bargaining agreement executed by us on May 1, 1979, in all its terms.

WE WILL make whole our employees by making the pension and health and welfare contributions we have failed to pay since January 3, 1980, by remitting to the Union the dues we have withheld from our employees' pay since January 3, 1980, plus interest, by paying the vacation benefits we have failed to pay since January 3, 1980, plus interest, and by paying our employees any wage increases we have failed to pay since May 1, 1980, plus interest, all as required by our collective-bargaining agreement with the Union.

BILDISCO AND BILDISCO,
DEBTOR-IN-POSSESSION
(Employer)

Dated ..... By .....
(Representative) (Title)

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 81-513

IN RE:

BILDISCO, A General Partnership of
the State of New Jersey

May 4, 1981
Trenton, New Jersey

OPINION

BEFORE:

THE HONORABLE ANNE E. THOMPSON, U.S.D.J.

APPEARANCES:

ZAZZALI, ZAZZALI & KROLL, ESQS.
By: ALBERT G. KROLL, ESQ.
For Local 408

RAVIN, KATCHEN & GREENBERG, ESQS.
By: JACK M. ZACKIN, ESQ.
For the Debtor

VINCENT RUSSONIELLO, C.S.R.
Official Court Reporter

THE COURT: This is an appeal from an Order of the United States Bankruptcy Court for the District of New Jersey filed on January 15, 1981. In that order, the Bankruptcy Court granted the motion

of Bildisco, Debtor in Possession, to reject a May 1, 1979 collective bargaining agreement between Bildisco and Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Union"). An appeal to this Court from that order followed.

The standard under which we must review a ruling by the Bankruptcy Court is set out in Rule 810 of the Rules of Bankruptcy Procedure:

> Upon an appeal the district judge may affirm, modify or reverse a referee's judgment or order, or remand with instructions for further proceedings. The court shall accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge the credibility of the witnesses.

"If there is a reasonable basis in the record for a bankruptcy judge's ultimate findings of fact, a reviewing court cannot substitute its own ultimate findings of fact simply because it regards its views as effecting a more desirable result than that reached by the bankruptcy judge." *In re Botany Industries*, 463 F. Supp. 793, 795 (ED Pa. 1978); *In re Hollock*, 1 B.R. 212, (M.D. Pa. 1979). As a practical matter, what this means is that a

> finding is "clearly erroneous" when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed.

United States v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *In re Knight*, 421 F. Supp. 1387, 1390 (M.D.La.) (1976).

Under Section 365 of the Bankruptcy Code, 11 U.S.C. § 365, a trustee or a debtor in possession is

given the right to reject executory contracts in this language:

> Except as provided (elsewhere), the trustee subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

The case of *Shopmen's Union No. 455* v. *Kevin Steel Products*, 519 F. 2d 698 (2d Cir. 1975) was the leading opinion dealing with the rejection of collective bargaining agreements under the old Bankruptcy Act. Under the new Bankruptcy Code, is is not settled whether the standards developed in *Kevin Steel* and those cases which followed it are still applicable to the rejection of executory contracts. Because we find that the lower court's order meets both the old and the proposed new standards, we do not find it necessary to resolve this question.

If Section 365 does not incorporate the *Kevin Steel* standard, then it is likely that collective bargaining agreements will not be treated any differently under § 365 than any other executory contracts. This being so, the so-called "business judgment test" for their rejection would apply. Under this test, "(i)t is enough, as a matter of business judgment, rejection of the burdensome contract may benefit the estate." *Matter of Minges*, 602 F. 2d 38, 43 (2d Cir. 1979).

Under the record as it stands we find ample justification for the Bankruptcy Court to make the finding that a rejection by the debtor of the collective bargaining agreement would be a sound exercise of its business judgment. Rejection would result in a savings of approximately $100,000. (T. 7) This alone would appear to justify rejection under the "business judgment" test.

On the other hand, it may be that Congress intended to preserve the special treatment accorded to collective bargaining agreements under former Section 313, (now 365). As set forth in *Kevin Steel* and its progeny,

> The cases suggest that a two step analysis be employed by the bankruptcy court in deciding whether to permit rejection of a collective bargaining agreement . . . (citations omitted) . . . First, the court should determine that the agreement is onerous and burdensome to the estate, so that failure to reject will make a successful arrangement impossible. Second, the equities must be balanced and found to favor the debtor.

Matter of Alan Wood Steel Co., 449 F. Supp. 165, 169 (E.D. Pa. 1978).

The Bankruptcy Court did not make a specific finding as to the test to be applied in the rejection of the collective bargaining agreement. It merely notes that "this is not a case under the Bankruptcy Act; it is under the Bankruptcy Code." (Tr. 36). However, we feel that there was evidence before the Bankruptcy Court upon which it could reasonably base the findings required by the *Kevin Steel* test, and therefore, we cannot say that its ruling was "clearly erroneous."

First, the Court heard testimony that the creditors who approved the plan believed that the rejection of the union contract was "highly involved" with the success of the plan. (Tr. 8) The Court itself noted that the testimony established that rejection would save the debtor some $100,000 per year. (Tr. 31) Therefore, the Court did have a basis upon which it could find that the collective bargaining agreement was burdensome to the debtor.

Second, the Court did weigh the equities in this matter. It noted that

> the union and the employes have a right to claim damages as a result of the rejection of the contract. They can file a complaint for the purpose of having damages fixed . . . and there will have to be a trial on the damages to ascertain what the damages will be.

(Tr. 32)

The transcript of the hearing in this matter reveals that the Court found that the collective bargaining agreement was burdensome to the debtor, and that it would be to his distinct advantage to reject the agreement. Furthermore, the Court found that although the union and the employees would suffer injury as a result of the rejection, given their right to seek damages, the injury which they would suffer would not outweigh the advantage to the debtor from rejection.

Because we believe that there exists ample evidence in the record—and we note as the Bankruptcy Court did that the moving party's evidence was uncontradicted by the opposing side—to support the order below, we do not believe that any error was committed by the Bankruptcy Judge. Accordingly, the order will be affirmed.

The Court will enter an appropriate form of order.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 81-513

IN THE MATTER OF:

BILDISCO, A General Partnership
of the State of New Jersey, DEBTOR

ORDER AFFIRMING JANUARY 15, 1981
ORDER OF BANKRUPTCY COURT

This matter being brought before the Court on appeal from an order granting the motion of the Debtor in Possession, Bildisco, to reject the Executory Contract dated May 1, 1979 with Teamsters Union Local No. 408 brought by Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, by Zazzali, Zazzali & Kroll, P.A., Albert G. Kroll, Esquire, appearing; and Ravin, Katchen & Greenberg, P.A., counsel for Bildisco, Jack M. Zackin, Esquire, appearing; and the Court, having considered the arguments of counsel and the papers submitted; it is on this 5th day of May, 1981,

ORDERED that the order entered in this matter on January 15, 1981, granting the motion of the debtor in possession to reject the Executory Contract be and hereby is affirmed.

[Filed May 6, 1981]

/s/ Anne E. Thompson
ANNE E. THOMPSON
U.S.D.J.

APPENDIX F

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

No. 80-07283

IN THE MATTER OF:

BILDISCO, A General Partnership
of the State of New Jersey, DEBTOR

In Proceedings for a Reorganization under
Chapter 11 of the Bankruptcy Code

ORDER

This matter being opened to the Court by Ravin Katchen & Greenberg, P.A. on the return date of Notice to Reject Executory Union Contract with Teamsters Union Local No. 408, in the presence of Zazzali, Zazzali & Kroll, Esqs, the Court having considered the testimony and evidence presented, and having considered the arguments of counsel in opposition to the Motion of the Debtor, and due cause appearing;

IT IS on this 15th day of January 1981;

ORDERED:

1. That the Motion of the Debtor in Possession to reject Executory Union Contract dated May 1, 1979 with Teamsters Union Local No. 408, be and hereby is granted.

2. That said Teamsters Union Local No. 408 shall be allowed thirty (30) days from the date of entry of the within Order to file its claim for damages, if any, resulting from such rejection.

/s/ Amel Stark
Bankruptcy Judge

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